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No. _____

In The

Supreme Court of the United States

October Term, 1993

REGENER LEVON BOARDS AND
BRENDA SUE STEELE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit's reversal of the district court's grant of acquittal was proper particularly when the finding conflicts with the Seventh Circuit's ruling in *United States v. Olinger*, 759 F.2d 1293 (7th Cir. 1985)?

2. Whether, in context of the Government's prosecution of the Petitioners, the meaning of 42 U.S.C. §1973i (c) precludes a finding of guilt when the voting of another person's ballot was not *her* ballot but *another* registered voters absentee ballot?

3. Whether, the district court erred in its failure to extend the acquittal of the Petitioners on all counts of the indictment?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are those listed in the caption (including Regener Levon Boards, Brenda Sue Steele and the United States). Both Boards and Steele appear before this Honorable Court as Petitioners. The government is the Respondent before this Court.

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UNITED STATES OF AMERICA,

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Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners herein respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit entered in this action on December 6, 1993 and the opinion of the District Court entered on January 6, 1993.

OPINIONS BELOW

The decision of the district court is not reported. The decision of the court of appeals is reported at 10 F.3d (8th Cir. 1993).

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered on January 4, 1994. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. section 1973i (c):

> Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to vote [shall be guilty of an offense against the United States]

STATEMENT OF THE CASE

The Petitioners are residents of the Delta of Arkansas and were indicted as campaign workers for an African American Republican candidate for the State Representative position created by virtue of redistricting litigation under the Voting Rights Act in the State of Arkansas. The Republican candidate, Arnell Willis, solicited Petitioners Boards and Steele's aid with respect to the solicitation of absentee voters in the election that pitted Willis against the Democratic African American candidate, Jimmy Wilson. Wilson won the election.

Steele is Willis' cousin and is a political novice. She worked without pay and testified in the district court

below that she had never conducted absentee balloting, had never participated in the election processes before and aided Willis because of his promise to aid her in finding employment.

Boards is and was not a political novice. Boards testified in the district court below that her parents formed the first Westside Voter's League for Women in their home in Helena, Arkansas, that she had traditionally supported Democratic candidates and in the election in question she supported Jimmy Wilson, but agreed to aid collecting absentee ballots because Willis had aided her in keeping her lights on in her home by obtaining an extension on the payment of the bill. Willis was not indicted.

The indictment returned against Boards and Steele accused them of aiding and abetting Willis and others unknown, to violate 42 U.S.C. section 1973i (c); that is:

> (a) to vote more than once and cause others to vote more than once, in violation of Title 42, United States Code, Section 1973i (e), Title 18, United States Code, section 2; and (b) to knowingly and willfully give and cause to give false information as to *his* name for the purpose of establishing his eligibility to vote, in violation of Title 42, United States Code, Section 1973i (c), and Title 18, United States Code, Section 2.

Petitioner Boards, at trial, denied the forging of signatures (Supp. Tr. at 145 - 148). Factually, at trial, none of the witnesses provided any testimony as to Boards voting their ballots. A Henry Ben Shears couldn't remember the sexes of the people who approached him (Supp. Tr. at 4, lines 20-25); Quinella Lee Mitchell couldn't describe the

person who approached her (Supp. Tr. at 4, lines 20-25); Quinella Lee Mitchell couldn't describe the person who approached her (Supp. Tr. at 16, lines 1-3; 25, lines 1-25), but related that she knew Regener Boards as a person who visited her home after their sons were involved in a fight (Supp. Tr. at 27, lines 1-9). Alberta Lampkins explained that person who voted her ballot was a thin woman and described Boards and Steele as being "definitely not thin women." (Supp. Tr. at 50-51).

At trial, Steele provided that she was a political novice, did not know how to fill out Absentee Ballots, did not receive training, and that permission was granted by the voters in question.

The Government, in its brief to the Eighth Circuit, concedes that each of the substantive counts "alleged that defendants Boards and Steele violated these statutes by submitting or causing to be submitted a fraudulent voting document in the name of another person in the November 6, 1990 general election in Phillips County, Arkansas" (Brief of Appellant at 1). Factually, the Government contends that "in connection with the November 6, 1990 general election in Phillips County, Arkansas, defendants Regener Levon Boards and Brenda Sue Steele completed and submitted Applications for Absentee Ballots in the names of registered voters, regardless of whether the voters actually wanted them or had legitimate reasons to request them. Boards and Steele wrote in the post office box (Number 2564) of Arnell Willis, the candidate for State Representative for whom they were working, on each of these Applications, requiring the County Clerk's Office to mail the voters' ballots there. Exs. 1B, 2B, 3B, 4B, 5B, 6B(2), 7B(2), 9B 10B. The evidence

showed that the defendants engaged in this fraudulent conduct for the purpose of establishing their eligibility, or that of others with whom they were working, to steal their victims' ballots. In fact, each fraudulent application that was not detected by the Clerk's Office resulted in a ballot voted without the know'edge or permission of the voter" (Brief of Appellant at 2, 3). Steele was acquitted by the jury with respect to the Government's contention that she conspired with Boards, Willis and others.

The Government's proof at trial with respect to Henry Ben Shears is reflective in the testimony of its handwriting expert, Robert Muehlberger. Muehlberger explained that it was his opinion that the signature on the voter statement form was not written by Henry Ben Shears; however, that "the signature on the application for absentee ballot form was a genuine signature." (T. at Vol. III at 497, lines 4-7). Muehlberger also provided that he drew a conclusion that the voter statement signature was probably written by Regener Boards, but explained that there were some discrepancies which he was not able to resolve in the known handwriting exemplars which would allow him to identify positively that the signatures were her signatures, "however, there was enough evidence that I was able to form a presumption that she did write it. However, I could not be certain because of the discrepancies." (Tr. at Vol. III at 497, 23-25, 498, lines 1-7). The Government also submitted the voter documents to the laboratory for examination and testing. Each document was tested for finger and palm prints of the Petitioner Boards. Each document was returned as negative (including Petitioner Steele's) (Tr. at Vol. II, at 438, lines

1-18; 442-443). The jury elected to believe the Government's proof and convicted the Petitioners on the substantive counts.

The Government's concentration was on section 1973i (c), that is, *knowingly and willfully give and cause to give false information as to his name for the purpose of establishing his eligibility to vote.* The indictment tracked 42 U.S.C. section 1973i (c) with the exception of deleting *his.* The Government presented no evidence that the Petitioners voted their individual ballots more than once.

At the termination of the trial, the district court granted the Petitioner Boards' Motion Notwithstanding the Jury Verdict as to Counts 1, 3, and 4, but let stand the conspiracy count and substantive Count 5. The district court granted the Petitioner Steele's Motion Notwithstanding the Jury Verdict on all counts. The Court's reasoning in its Memorandum Order, explains "[t]he government established that both defendants voted in the November 6, 1990, general election. Its charge that the named defendants conspired to vote 'more than once' is based upon the theory that they obtained absentee ballots in the names of other voters and then voted those ballots themselves, or caused those ballots to be voted, by a co-conspirator, in the general election. In connection with the conspiracy count the government does not have to prove that a conspirator conspired to commit both offenses as alleged, i.e.: a violation of 42 U.S.C. section 1973(e) (1) *and* a violation of Title 42 U.S.C. section 1973i (e). It is sufficient if the government proves that the defendant conspired to violate either one or both of such offenses against the United States." (Memorandum Order, at 3).

The district court, in its ruling, further explained "[i]t will be recalled that the substantive counts are all based on 42 U.S.C. § 1973i (c). The government does not contend that either defendant gave any false information in order to establish anyone's 'eligibility to register' or that the defendants 'conspired with another individual for the purpose of encouraging his false registration to vote or illegal voting'. Therefore, the operative language in section 1973i (e) upon which the government is relying to support the charges set forth in the substantive counts, is as follows:

> 'Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to . . . vote' [shall be guilty of an offense against the United States.]

The defendants contend that whatever they have done wrong or illegally under Arkansas law in connection with the 1990 general election, they did not violate [section] 1973 (c). They contend that there is no evidence that they either gave 'false information' as to her name, address or period of residency. In fact, neither defendant gave any information as to her own name, address or period of residency in the voting district. Rather, each gave information as to *other voters'* names and addresses, and the information so given was true.

The government contends that the defendant's interpretation of § 1973i (c) would make the statute ineffective in dealing with the factual situation present here. It argues that, at least in this absentee balloting context, 'his name' should mean the name of any person other than

the defendant. And, if the stratagem is to get control of some other person's ballot and to vote same, then, in using the name of any other voter (that is, in using any name other than his or her own) the defendant is giving false information, 'as to her name, address', etc.

According to the language of the statute, the government must prove that each defendant provided the specific false information 'for the purpose of establishing his (her) eligibility to . . . vote'. The defendants contend that, at most, the government proved that each defendant's purpose was to establish the 'eligibility' of *another* registered voter to vote absentee in the 1990 general election. Except with respect to Count Five, the Court sees no basis for the government's contention that either defendant's purpose was to establish *her own* 'eligibility to vote.' " (Memorandum Opinion at Appendix at 9).

As stated, the district court's memorandum opinion granted most of the relief requested by the Petitioners. The Government/Respondent appealed from the district court's decision. The Petitioner Boards cross-appealed from the district court's failure to grant acquittal on the remaining conspiracy count and on the one substantive count.

The Eighth Circuit, reversing in part, and affirming, in part, overruled the district court's grant of acquittal of the Petitioners, ruling that the statute could be read liberally and accepted the Government's argument that *his* does not mean *his* and that *any person or persons* can be read into the statute's language. The Eighth Circuit also

affirmed the district court's allowing the conspiracy conviction against Boards and the remaining substantive count.

Petitioners, in turn, filed their Motion for Rehearing with the Eighth Circuit. The circuit court denied the motion for rehearing on January 4, 1994. And finally, the Petitioners filed their Application for Stay of Execution of Sentencing Pending the Filing of this Writ of Certiorari on January 24, 1994. This Court denied the Petitioners' request on January 27, 1994.

REASON FOR GRANTING THE WRIT

I & II: (RESTATED) THIS CASE REPRESENTS A CASE OF FIRST IMPRESSION IN THAT THE EIGHTH CIRCUIT'S INTERPRETATION OF TITLE 42, UNITED STATES CODE, SECTION 1973i (c) EXPANDS THE CONGRESSIONAL INTENT AS TO THE STATUTE INCLUDING *HIS* AND NOT A GENERIC REFERENCE TO PERSONS.

This case presents an important issue of the scope and intent of a criminal statute and the improper broadening of the statute's scope by the Eighth Circuit in order to allow the conviction to stand with respect to the Petitioners. The Seventh Circuit, in the case of *Olinger v. United States*, 759 F.2d 1293, 1299 (7th Cir. 1985), the Court in interpreting 1973i (c) explained that "a conspiracy with more than one other individual, for example, would fall

outside the scope of section 1973i (c). Likewise, an individual who is 'encouraged' to participate in false registration or voting and agrees to become part of such a conspiracy would escape conviction for conspiracy under section 1973i (c). Different conclusions might be reached were we to give the language of the statute a liberal interpretation, but the rule of lenity counsels against expansive construction of a criminal statute." *See also United States v. Howard*, 774 F.2d 838, 842 (7th Cir. 1985).

The Eighth Circuit, to the contrary, ignores and creates a conflict with the Seventh Circuit, when it writes "We first address the district court's decision to acquit Boards and Steele based on its interpretation of § 1973i (c). The pertinent language of § 1973i (c) prohibits 'knowingly or wilfully giv[ing] false information as to [a person's] name . . . for the purpose of establishing [the person's] eligibility to register or vote.' 42 U.S.C. section 1973i (c)" *See Eighth Circuit's Opinion at Appendix at 20, 21.* In essence, the Eighth Circuit expands the intent and scope of Congress. By way of example, if this Court deems the language of subsection (c) to be ambiguous, the ambiguity should be resolved by a review of the legislative history, which provides a legitimate guide to the bill's statutory purpose. *Burlington Northern R. Co. v. Oklahoma Tax. Comm'n*, 481 U.S. 454, 461 (1987). Review of the relatively sparse legislative history of the false information provision in section 1973i (c) reveals that the section was intended to encourage honesty among many newly registering voters and prevent them from committing voter fraud. Opponents of the Voting Rights Act of 1965 argued that the massive influx of new voters would inevitably include many fraudulent registrations. This

particular provision was intended to provide a mechanism to encourage responsibility among the new voters and to prosecute those voters who took advantage of the new law. Remarks of the sponsor of the provision, Senator Williams of Delaware, spell out his thinking. He argued:

> if in the general election [certain individuals] voted as [a] result of [a] fraudulent registration, under my amendment they could be prosecuted. The person *himself* could be prosecuted under the amendment because he had given false information in registering. . . . If there is a conspiracy *between those illegally registering and second party* they can both be held responsible. . . . By the same token, when we guarantee that man the right to register *he* should have some responsibility *he* is giving the registrar the proper information and is not registering in a state or district in which *he* does not qualify to vote. 111 Cong. Rec. 8425 (1965) (emphasis added)

The sponsor's comments clearly indicate that the false information provision was intended to apply only to the registrant or those conspiring with the registrant, not others who might use the registrant's name or other qualifying information. The district court was correct in its assessment that the statute's scope was to prohibit an individual from knowingly and willfully giving false information as to *his* name, address, or period of residence in the voting district for the purpose of establishing *his* eligibility, the Eighth Circuit accepted the Respondent's indictment writing out the single form [*his or her*], or the possessive form of the statute's intent and allows for the extension of the plain wording of the

statute to become that which is proscribed and thus allowing individuals other than the registrar himself or herself to be the subject of the statute's intent.

The district court, in rejecting the convictions, wrote "the Court agrees with the arguments of the defendants that criminal liability should not be permitted to rest upon such a strained, awkward, unnatural and convoluted interpretation of the statute. The government really is arguing that there ought to be a federal law prohibiting what the defendants are charged with in those counts. The Court is inclined to agree, but Title 42 § 1973i (c) simply does not do the job." *See Appendix at page 9.* The district court, in explaining the reason for the acquittal, further writes "[t]he most obvious purpose of § 1973i (c) is to make it a crime for individuals to give false information *when registering* as to his or her name, address or period of residence in the voting district or, *in connection with voting*, to any such false information. In the latter situation, if a person comes into the voting place and willfully represents that he is another person who has properly resided in the precinct for the required length of time, he would be violating the Act. And, when *registering*, if a person willfully gives false information as to his name, address or length of time he has resided in the voting precinct for the purpose of establishing his eligibility to register, then his or her said acts would also violate the statute. In either case, the defendant would be representing "I am Mr. (or Ms.) so and so" (false) for the purpose of establishing his or her own (the defendant's) eligibility to register or to vote – a straightforward case under § 1973i (c). But that section simply does not fit the

application process in this absentee voting context" *See district court's opinion at Appendix at 10, 11; see also* cases that fall within the purview of the statute, to-wit: *United States v. Campbell,* 845 F.2d 782 (8th Cir. 1988); *cert. denied,* 488 U.S 965 (1988) (question of paying for votes); *United States v. Howard,* 774 U.S 838 (7th Cir. 1985) (which concerns a voter using an address within the precinct in which the voter did not reside).

CONCLUSION

In light of the importance of the court of appeals' decision as it affects the interpretation of this most important civil rights enforcement statute (with criminal penalties), it is prayed that this Court grant the writ of certiorari. In addition, the reversal by the court of appeals of the district court's acquittal is improper in light of rewriting the statute and the insertion of new words of

meaning [*persons*] rather than the restrictive words and intent of Congress [*his or her*].

Date: April 4, 1994

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA PLAINTIFF

VS. NO. LR-CR-92-183

REGENER LEVON BOARDS
BRENDA SUE STEELE DEFENDANTS

MEMORANDUM OPINION AND ORDER

(Filed Jan. 6, 1993)

The "Defendants' Motion for Judgment of Acquittal Notwithstanding the Verdict" is before the Court.

The defendants were charged in a nine-count indictment which contained one conspiracy count and eight substantive counts, four of the substantive counts charging the defendant Boards and four the defendant Steele. One of the latter (count seven) was dismissed upon the motion of the government before the trial.

Count one, the conspiracy count, charged that the defendants Boards and Steele "did knowingly, willfully and intentionally conspire . . . with each other, and others known and unknown to the grand jury," 1) to vote more than once and cause others to vote more than once in violation of Title 42 U.S.C. § 1973i(e) and Title 18 U.S.C. § 2, and 2) to knowingly and willfully give and cause to be given "false information as to name for the purpose of establishing eligibility to vote" in violation of U.S.C. § 1973i(c) and Title 18 U.S.C. § 2.

Each of the substantive counts, with the exception of count five, charges either the defendant Boards or the

defendant Steele with knowingly and willfully giving and causing to be given "false information as to her name for the purpose of establishing her eligibility to vote" by submitting or causing to be submitted an Application for Absentee Ballot in the name of another voter in connection with the November 6, 1990, general election. Count five charged the defendant Boards with knowingly and willfully giving and causing to be given "false information as to her name for the purpose of establishing her eligibility to vote" by submitting and causing to be submitted an absentee ballot and Voter Statement in the name of Henry Shears in the 1990 general election.

The jury found the defendant Boards guilty on all counts against her. It found the defendant Steele not guilty of count one, the conspiracy count, but guilty on counts six, eight and nine.

The pertinent portion of Title 42 § 1973i reads as follows:

> *1973i(c)*
>
> Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting [shall be guilty of an offense against the United States.]
>
> *1973i(e)*
>
> Whoever votes more than once in an election referred to in paragraph two [shall be guilty of an offense against the United States.]

The government established that both defendants voted in the November 6, 1990, general election. Its charge that the named defendants conspired to vote "more than once" is based upon the theory that they obtained absentee ballots in the names of other voters and then voted those ballots themselves, or caused those ballots to be voted, by a co-conspirator, in the general election.

In connection with the conspiracy count the government does not have to prove that a conspirator conspired to commit both offenses as alleged, i.e.: a violation of 42 U.S.C. § 1973i(e)(1) *and* a violation of Title 42 U.S.C. § 1973i(e). It is sufficient if the government proves that the defendant conspired to violate either one or both of such offenses against the United States.

FACTS ESTABLISHED

Viewing the evidence in the light most favorable to the government, as we must, a reasonable jury could have found the following facts beyond a reasonable doubt:

Mr. Arnell Willis, a city councilman in West Helena, Arkansas, ran as an unsuccessful candidate for the office of state representative in the November 6, 1990, general election. The defendants assisted Mr. Willis in soliciting absentee votes for that election. Both were paid rather nominal amounts for such work. The Defendant Brenda Sue Steele is a cousin of Mr. Willis.

Mr. Willis apparently took one or both of the defendants by the county clerk's office and obtained a list of the names of persons who had voted absentee in prior

elections. He asked the defendants to assist him in getting such persons to vote absentee for him in the November 6, 1990, general election. He instructed the defendant to have the applicants for absentee ballots to request on their application that the clerk send the absentee ballot and Voter Statements to a certain post office box controlled by him. The government in its opposition to the defendants' motion summarizes much of the evidence as follows:

> The defendants submitted Applications for Absentee Ballots in the names of voters, regardless of whether they actually wanted them or had legitimate reasons to request them, and filled out the forms so as to require the clerk's office to mail the voters' ballots to a post office box controlled by a candidate for whom the defendants were working. The Applications of Joyce Riley, Regina Barrow, and Pearlean Hamilton were filled out by Boards, who also forged their signatures. The applications of Bertha Brown, Louvenia Hampton, and Eddie Lee Mathews, Sr. were filled out and signed by defendant Steele. None of these six persons asked the defendants to apply for absentee ballots in their names.
>
> The Applications of Henry Ben Shears, Quinella Williams Mitchell, Alberta Lampkins and Reedie Winston, all of whom wanted absentee ballots, were signed by the actual voters and filled out by the defendants – Winston's by Steele and the other three by Boards. As with all of the other Applications, the defendants filled out the forms to require that the ballots be returned to the designated post office box. None of the voters

> authorized the defendants to have their absentee ballot sent to a post office box.
>
> All five absentee ballots that were sent to the post office box by the clerk's office in response to the Applications submitted by the defendants were returned to the clerk's office by the defendants and their co-conspirators, without the knowledge or permission of the defrauded voters. Four of the Voter Statements that accompanied the ballots were filled out, and the voters' signatures forged, in a common, "loopy" writing, and the Voter Statement of Mr. Shears was filled out and forged by defendant Boards herself.

The Court accepts that a jury could have found the facts as here stated in the government's response except for some of the language in the last paragraph. See discussion below.

DISCUSSION OF GUILTY VERDICTS AGAINST MS. STEELE

The Court again notes that the defendant Steele was acquitted of the conspiracy count. Consistent with the jury's "not guilty" verdict, the Court concludes that there was no evidence from which a reasonable jury could have found that the five absentee ballots (which were sent by the clerk's office to Mr. Willis' post office box) were returned to the clerk's office by the defendant Steele or by anyone acting in concert with her. Rather, the evidence is that the defendant Steele turned over the completed applications to Mr. Willis and had nothing further to do with the matter. Those applications ended up in the clerk's office and the clerk's office then sent the ballots

and voting material to Mr. Willis' post office box as directed in the applications. There is no evidence from which the jury could have found beyond a reasonable doubt that the defendant Steele knew or believed that Mr. Willis would fail to take the ballots and voting materials back to the actual named absentee voters in order that those voters could exercise their right to vote as contemplated by the Arkansas law. So there was no evidence that Ms. Steele's purpose in filling out the absentee applications and in turning them over to Mr. Willis was to cause the absentee ballots (later sent to Mr. Willis' post office box) to be voted by anyone other than the lawfully registered voter.

And there is no evidence from which the jury could have found beyond a reasonable doubt that the defendant Steele conspired with, aided or abetted, or acted in concert with the defendant Boards.

So even if the Court were to accept the government's strained interpretation of § 1973i(c), (See discussion below) the jury's verdict finding Ms. Steele guilty with respect to counts six, eight and nine would still have to be set aside.

DISCUSSION OF THE GUILTY VERDICTS AGAINST MS. BOARDS

If, however, the Court accepts the *government's* interpretation of Title 42 § 1973i(c) (See below), the result would be different with respect to the "application" counts against defendant Boards, (Counts Two, Three, and Four). Her conviction on Count One and also on Count Five reinforces this conclusion. In connection with

the latter charge, the jury found that Ms. Boards submitted or caused to be submitted "an absentee ballot and Voter Statement in the name of Henry Shears." This means that, *after* the ballot and Voter Statement were sent to Mr. Willis' post office box, Ms. Boards obtained same (assumedly from Mr. Willis), and voted Mr. Shears' ballot in the November 6, 1990 election. So there is evidence that Ms. Boards gave false information for the purpose of establishing her ability (or the ability of Mr. Willis, or some other co-conspirator), to actually vote the ballots of applicants for absentee ballots. If that is enough, then the jury's guilty verdicts with respect to all of the substantive counts against Ms. Boards would have to be upheld.

With respect to Count One, the Court has reviewed the evidence and the arguments of the parties and concludes that there was adequate evidence from which the jury could have found the defendant Boards guilty of the conspiracy charged therein. Her motion for judgment of acquittal with respect to that count will therefore be denied.

DISCUSSION OF 42 U.S.C. § 1973i(c)

It will be recalled that the substantive counts are all based on 42 U.S.C. § 1973i(c). The government does not contend that either defendant gave any false information in order to establish anyone's "eligibility to register" or that the defendants "conspired with another individual for the purpose of encouraging his false registration to vote or illegal voting." Therefore the operative language in § 1973i(c) upon which the government is relying to

support the charges set forth in the substantive counts is as follows:

> "Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to. . . . vote" [shall be guilty of an offense against the United States.]

The defendants contend that whatever they may have done wrong or illegally under Arkansas law in connection with the 1990 general election, they did not violate § 1973i(c). They contend that there is no evidence that either gave "false information" as to her name, address or period of residency. In fact neither defendant gave any information as to her own name, address or period of residency in the voting district. Rather each gave information as to *other voters'* names and addresses, and the information so given was true.

The government contends that the defendants' interpretation of § 1973i(c) would make the statute ineffective in dealing with the factual situation present here. It argues that, at least in this absentee balloting context, "his name" should mean the name of any person other than the defendant. And, if the stratagem is to get control of some other person's ballot and to vote same, then, in using the name of any other voter (that is in using any other name than his or her own) the defendant is giving false information, "as to his name, address" etc.

According to the language of the statute, the government must prove that each defendant provided the specific false information "for the purpose of establishing his (her) eligibility to . . . vote." The defendants contend that,

at most, the government proved that each defendant's purpose was to establish the "eligibility" of *another* registered voter to vote absentee in the 1990 general election. Except with respect to Count Five, the Court sees no basis for the government's contention that either defendant's purpose was to establish *her own* "eligiblity to vote."

The government appears to contend that each defendant's purpose was to establish her *ability* ("not eligibility") to *illegally* vote another person's ballot in the general election 1990 and that that is enough under § 1973i(c).

With respect to Counts Two, Three, Four, Six, Eight and Nine, the Court agrees with the arguments of the defendants that criminal lability [sic] should not be permitted to rest upon such a strained, awkward, unnatural and convoluted interpretation of the statute. The government really is arguing that there ought to be a federal law prohibiting what the defendants are charged with in those counts. The Court is inclined to agree, but Title 42 § 1973i(c) simply does not do the job.[1]

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[1] Absentee voting has probably been the greatest single source of voting fraud in this state during the last thirty years. Some abuses, such as the manipulation of incompetent persons, are difficult to control. But some abuses could be significantly reduced by changes in the law, both state and federal.

State law, such as we have here, which permits an absentee voter to designate someone else's post office box (or some other address that is not the voter's own address) as the place to which absentee ballots should be sent, is an invitation to mischief and probably should be reexamined by the Arkansas General Assembly. To permit candidates for office, or their campaign workers, to solicit invalids (and others who must vote

The most obvious purpose of § 1973i(c) is to make it a crime for individuals to give false information *when registering* as to his or her name, address or period of residence in the voting district or, *in connection with voting*, to give any such false information. In the latter situation if a person comes into a voting place and willfully represents that he is another person who has properly resided in the precinct for the required length of time, he would be violating the Act. And, when *registering*, if a person willfully gives false information as to his name, address or

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absentee) to vote for that candidate is one thing. To permit those voters to designate the candidate's own post office box as the place to which the absentee voter's ballots should be sent is quite another. Such a law invites the type of conduct that is revealed in the evidence in this case.

The United States Congress might also consider a provision making a violation of a state's voting laws (including its absentee voting laws), in connection with a "federal election" a federal crime. Whether that is necessary or good policy would be for the Congress to decide.

This case probably could have been prosecuted under 18 U.S.C. § 1341, commonly referred to as the mail fraud statute, since the defendants could have been charged with having caused the County Clerk to use the mail in connection with a scheme to defraud registered voters of their votes. The mail fraud statute is broadly drawn and "generally prohibits any scheme or artifice to defraud which in some way involves the use of the postal system." *United States v. Pearlstein*, 576 F.2d 531, 534 (1978). Several Circuits, including the Eighth Circuit, have specifically held that the use of the postal system in absentee ballot fraud schemes violates 18 U.S.C. § 1341. *See United States v. States*, 488 F.2d 761, 764 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974); *United States v. Clapps*, 732 F.2d 1148, 1153 (3d Cir. 1984); *United States v. Girdner*, 754 F.2d 877, 880 (10th Cir. 1985); *see also United States v. Odom*, 736 F.2d 104, 116 n. 13 (4th Cir. 1984).

the length of time he has resided in the voting precinct for the purpose of establishing his eligibility to register, then his or her said acts would also violate the statute. In either case the defendant would be representing "I am Mr. (or Ms.) so and so" (false) for the purpose of establishing his or her own (the defendant's) eligibility to register or to vote – a straightforward case under § 1973i(c). But that section simply does not fit the application process in this absentee voting context.[2]

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[2] The Court has reviewed the cases cited by the government in its response to defendants' motion. In *United States v. Campbell*, 845 F.2d 782 (8th Cir. 1988), *cert denied*, 488 U.S. 965 (1988), the Court was faced with the language in 42 U.S.C. § 1973i(c) prohibiting paying for voting, and thus does little to further the discussion in the present case.

The portion of *United States v. Howard*, 774 F.2d 838 (7th Cir. 1985) which dealt with 42 U.S.C. §1973i(c) was concerned with whether there was a sufficient link to a federal election to implicate the statute. The *Howard* court found that there was a sufficient link. The defendants' conduct in *Howard*, voting by using an address within the precinct at which they did not then reside, falls squarely within the statutory parameters and thus is not particularly instructive.

The government cites *United States v. Olinger*, 759 F.2d 1293 (7th Cir. 1985), *cert. denied*, 474 U.S. 839 (1985), for the proposition that the existence or non-existence of the person whose name is falsely used is not relevant as to the application of the statute. The Court agrees, but this argument misses the crux of the Court's concerns. The more interesting portion of *Olinger*, in this Court's view, is that section which finds nothing to support the "contention that §1973i(c) represents a Congressional attempt to place all conceivable forms of vote fraud conspiracy exclusively within the ambit of this single statute." *Id.* at 1299. The *Olinger* court goes on to explain that "only a single form of conspiracy is proscribed by the statute, i.e. 'conspir[ing] with another individual for the purpose of encouraging his false

With respect to all of the substantive counts, except count five, the government's proof tended to establish that Mr. Willis (or at least someone other than one of the named defendants) was the person who would actually vote the ballots of the absentee voters. So the government was attempting to prove that each named defendant gave the "false information" for the purpose of establishing *Mr. Willis'* – not her own – eligibility to vote in the name of the registered absentee voter. So assuming the two "his" pronouns must relate to the defendant named in each substantive count, we have a problem. And neither a conspiracy charge relating solely to § 1973i(c) nor § 2 of Title 18 can save the day because the defendant himself or herself under that statute must both (1) give false information as to *her* name *and* (2) do so for the purpose of establishing *her* eligibility to vote the absentee ballot at issue.

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registration to vote or illegal voting.' Thus, a conspiracy with more than one other individual, for example, would fall outside the scope of §1973i(c) . . . Different conclusions might be reached were we to give the language of the statute a liberal construction, *but the rule of lenity counsels against expansive construction of a criminal statute." Id.* (Emphasis added). Applying this same rule of lenity to the government's interpretation of the statute in this case mandates this Court's decision that the facts of this case fall outside the scope of the statute.

Finally, the government cites *United States v. Cianciulli*, 482 F.Supp. 585 (E.D. Pa. 1979), a case in which the defendants were convicted of, among other things, conspiring to cause other persons to give false information as to where those other persons resided for purposes of establishing eligibility to vote. Again, the conduct in that case falls squarely within the ambit of the statute. The conduct in the present case does not.

Under Section 1973i(c) the government must also prove that the defendant "knowingly and willfully" gave false information as to his (her) name . . . " If the defendant did not "willfully" give "false information" there can be no conviction. The pertinent jury instruction given in this case is as follows:

> An act is done "knowingly" if the defendant realized what he was doing and did not act through ignorance, mistake or accident. An act is done "willfully" if it was done voluntarily and intentionally, with the purpose of doing something the law forbids, that is, either to disobey or disregard the law. You may consider the evidence of the defendant's acts and words at the time of the charged offenses or prior to trial, along with all the other evidence, in deciding whether the defendant acted knowingly and willfully.
>
> You may, but are not required to, infer that a person intends the natural and probable consequences or acts knowingly done or knowingly omitted.

No jury could, upon the evidence in this case, properly find that either defendant Boards or defendant Steele "willfully" gave any "false information as to her name" when they filled out the applications for the registered voters who they wanted to vote absentee. Yes, the jurors could have found that each defendant "knew" she was not putting her own name on those applications. But the evidentiary record is clear: neither defendant *thought* they were giving false information when they filled out *the names* of the registered voters on those applications. Yes, the jury could have found, and obviously did find, that

the defendants gave false information and made false representations in those applications, but not "as to her name" as required by the statute. They misrepresented, variously, the need, or reason, for voting absentee; they misrepresented that the applicant desired his or her absentee ballot to be sent to a certain post office box; and so forth. But the defendants did not willfully give false information as to their "names" as required by § 1973i(c).

Section 1973i(c) could have been written in more expansive terms, or it could have been supplemented with additional sections dealing with the situation where third persons are manipulated in the voting process. As written, § 1973i(c) serves a useful, but limited, purpose.

The right to vote and to have one's vote counted fairly in a legitimate election is widely considered one of the cornerstones of our American democratic system of government. The right to vote secure the preservation of all other rights. The seriousness of "stealing" the votes of other citizens cannot be overemphasized. Nonetheless, we are dealing here with a criminal case brought under a specific statute. Specific intent and willfulness are essential elements of the substantive crimes charged in the indictment. Because the "false information" covered by the statute is specific and limited ("as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility . . . to vote"), a general awareness by the defendant that he or she is doing something wrong is not enough. One cannot be convicted of willfully giving false information without knowing that he or she is in fact giving false information and without intending to give such false information.

So even if the government is correct in arguing that, properly viewed, we have here a scheme in which the defendants were not *really* seeking absentee ballots for the named registered voters but, rather, were seeking to get control of those ballots so that they or their confederates could vote same, and that they *knew* that they were not putting their own names on those absentee applications, it would still fail here because no jury could have found that the defendants "knowingly and willfully" gave the false information specified in the statute.

Now Count Five is different from the other substantive counts in that it charges that the defendant Boards knowingly and willfully gave false information "as to her name for the purpose establishing her eligibility to vote" by submitting an "absentee ballot and Voter Statement in the name of Henry Shears."

The proof established that the defendant Boards filled out the Application for Absentee Ballot, but that Mr. Shears signed that application himself. Then Ms. Boards gave the application to Mr. Willis who apparently sent it in to the County Clerk. The County Clerk sent the absentee ballot and Voter Statement to Mr. Willis' post office box as directed in the application. The reasonable inference is that Mr. Willis then gave the ballot and Voter Statement to Ms. Boards (or that Ms. Boards had access to Mr. Willis' post office box and obtained same herself). The proof would also have permitted the jury to find beyond a reasonable doubt that the defendant Boards filled out the Voter Statement and forged Mr. Shears name thereon, marked his absentee ballot (all without authorization from Mr. Shears), and returned it to the voting officials. So this is not the "once-removed" case

that we have in connection with filling out *absentee applications*. Here the jury could find, and did so find, that the defendant Boards willfully gave false information as to her name by representing that she was Mr. Shears in order to establish her (Board's) eligibility to vote Mr. Shears' absentee ballot. And the jury could find, and did so find, that the defendant Boards did this "knowingly and willfully." Clearly the jury could find that she *knew* she was giving false information as to her name by representing that she was Mr. Shears. Her willfulness is established by evidence of her forgery of Mr. Shears' name and from all of the other facts and circumstances.

So the Court will overrule the defendant Boards motion for judgment of acquittal as to Count Five.

To summarize, the Court is setting aside the jury's "guilty" verdict on all of the substantive counts, except Count Five, because under its interpretation of § 1973i(c), no jury could have found either defendant guilty on the basis of the evidence presented. If the government is correct on its interpretation of that statute, then the Court would deny the defendant, Boards' motion but would still grant the defendant Steele's motion for the reasons set forth above.

It is therefore ordered that the defendant Boards' motion for acquittal with respect to Counts One and Five, notwithstanding the jury's verdicts, be, and it is hereby, denied.

It is further ordered that the defendant Boards' motion for judgment of acquittal as to Counts Two, Three and Four be, and it is hereby, granted.

It is further ordered that the defendant Steele's motion for judgment of acquittal as to Counts Six, Eight and Nine, be, and it is hereby, granted.

/s/ Garnett Thomas Eisele
UNITED STATES DISTRICT JUDGE
1/6/93

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1397EA

United States of America,
Appellant,

v.

Regener Levon Boards,
Appellee,

United States of America,
Appellant,

v.

Brenda Sue Steele,
Appellee.

No. 93-2538EA

United States of America,
Appellee,

v.

Regener Levon Boards,
Appellant.

Appeals from the United States District Court for the Eastern District of Arkansas.

Submitted: September 13, 1993
Filed: December 6, 1993

Before JOHN R. GIBSON, FAGG, and BEAM, Circuit Judges.

FAGG, Circuit Judge.

A federal grand jury indicated Regener Levon Boards and Brenda Sue Steele for their participation in a fraudulent scheme to vote absentee ballots in the November 1990 general election held in Phillips County, Arkansas. The offices to be filled by this election included seats in the United States Senate and House of Representatives and the state legislature. Boards and Steele were charged with conspiracy to give false information about their names to establish eligibility to vote and conspiracy to vote more than once. *See* 18 U.S.C. § 371 (1988); 42 U.S.C. § 1973i(c), (e) (1988). Each woman was also charged individually in several counts with given false information about her name to establish eligibility to vote and aiding and abetting others in this offense. *See* 42 U.S.C. § 1973i(c) (1988); 18 U.S.C. § 2 (1988). A jury found Boards guilty on all counts and Steele guilty on all but the conspiracy count. The district court granted Boards's motion for judgments of acquittal on three of the false information counts, sustained Boards's convictions on the conspiracy count and one false information count, and granted Steele's motion for judgments of acquittal on all counts.

The Government and Boards appeal. We reverse the district court's judgments of acquittal for both Boards and Steele and affirm Board's other convictions.

In reviewing the district court's grant of Board's and Steele's motions for acquittal, we must view the evidence in the light most favorable to the jury's verdicts. *United States v. Pardue*, 983 F.2d 835, 845 (8th Cir.), *cert. denied*, 113 S. Ct. 3043 (1993). Having applied this standard to the evidence in this case, we conclude a reasonable jury could find beyond a reasonable doubt that Boards and Steele were guilty of the crimes for which they were convicted. *Id.* at 847. The Government's evidence in this case included the following. Boards and Steele completed absentee ballot applications in the names of other registered voters. Boards forged the voters' signatures on some applications. Steele marked some applications with X's even though the voters were able to sign their own names. The other cases, the voters signed the applications. Without any of the voters' authorizations, however, the applications directed the county clerk to send absentee ballots to a post office box controlled by the candidate for State Representative for whom Boards and Steele were working. Absentee ballots sent to this post office box were voted in favor of the candidate and returned to the county clerk's office without the knowledge or permission of the voters, along with voter statements containing signatures forged by Boards or others.

We first address the district court's decision to acquit Boards and Steele based on its interpretation of § 1973i(c). The pertinent language of § 1973i(c) prohibits "knowingly or willfully giv[ing] false information as to [a person's] name . . . for the purpose of establishing [the person's]

eligibility to register or vote." 42 U.S.C. § 1973i(c) (1988). The district court concluded submission of fraudulent absentee ballot applications using the names of other registered voters does not violate § 1973i(c). In the district court's view, § 1973i(c)'s prohibitions apply only to registering and voting, not to applying for an absentee ballot. We disagree. An absentee ballot application is a "vote" under the Voting Rights Act's broad definition because an absentee voter must first apply for an absentee ballot as a "prerequisite to voting." 42 U.S.C. § 1973l(c)(1) (1988) (defining term "vote"). Thus, § 1973i(c)'s prohibitions include absentee ballot applications.

The district court also concluded that a person using a real voter's name on a fraudulent ballot application does not violate § 1973i(c). The district court did not question the criminality of Board's and Steele's actions, but decided they did not violate § 1973i(c) because they used the names of real registered voters instead of inventing false names. We believe the district court's reading of § 1973i(c) is too narrow. There is no dispute that a person who "gives false information as to [the person's] name- . . . for the purpose of establishing [the person's] eligibility to . . . vote" violates § 1973i(c). This is exactly what Boards and Steele did. Because only registered voters are eligible to apply for and vote absentee ballots, the use of real registered voters' names was essential to the scheme to obtain and fraudulently vote absentee ballots for Board's and Steele's candidate. Obviously, Boards and Steele could not get the absentee ballots of other real voters by using their own names on the applications. Thus, Boards and Steele "[gave] false information as to

[their] name[s]" when they falsely used the names of real registered voters to apply for absentee ballots.

The district court further concluded Boards and Steele could not have violated § 1973i(c) because neither woman completed the absentee ballot applications "for the purpose of establishing [her] eligibility to . . . vote," but instead to allow their candidate or some other person fraudulently to vote. Because Boards and Steele were also charged as aiders and abettors under 18 U.S.C. § 2, however, they may be held accountable for their candidate's or an unidentified principal's acts of voting the ill-gotten absentee ballots. *See United States v. Simpson*, 979 F.2d 1282, 1285 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1345 (1993); *United States v. Clark*, 980 F.2d 1143, 1146 (8th Cir. 1992) (government need not prove identity of principal). In sum, the district court should not have granted judgments of acquittal based on § 1973i(c).

As an alternate ground for Steele's judgments of acquittal, the district court held the evidence of Steele's intent to deprive the voters of their ballots was insufficient to support her conviction. As we have already stated, however, we cannot say that a reasonable jury must have entertained a reasonable doubt about the Government's proof. *See Pardue*, 983 F.2d at 847. Steele testified she was trying to help the registered voters obtain absentee ballots when she marked the applications with X's and directed the absentee ballots be sent to the candidate's post office box. It was the jury's role to evaluate Steele's credibility and demeanor to resolve the issue of Steele's intent. *United States v. Long*, 952 F.2d 1520, 1525 (8th Cir. 1991), *cert. denied*, 113 S. Ct. 298 (1992). The jury could reject Steele's testimony and infer from her actions

that she intended someone other than the registered voters obtain and vote the ballots. *See United States v. Termini*, 992 F.2d 879, 881 (8th Cir. 1993) (to support guilty verdict, evidence need not exclude every reasonable explanation except guilt).

We also reject the district court's conclusion that Steele could not have intended to deprive the voters of their ballots because she gave the applications to the candidate and had nothing more to do with the scheme. Although Steele's role in the offense was completed when she filled out the applications, the jury could find she actively and intentionally aided and abetted in the voter fraud without personally committing every act of the offense. *See United States v. Smith*, 838 F.2d 436, 441 (10th Cir. 1988), *cert. denied*, 490 U.S. 1036 (1989); *United States v. Copple*, 827 F.2d 1182, 1187 (8th Cir. 1987), *cert. denied*, 484 U.S. 1073 (1988). Finally, the district court should not have considered Steele's acquittal on the conspiracy charge in setting aside the false information convictions because an acquittal on one count is not grounds to overturn a conviction on another count. *See United States v. Suppenbach*, 1 F.3d 679, 681 (8th Cir. 1993).

We now turn to Board's appeal of her remaining convictions. Boards contends there is insufficient evidence to support her conviction on the false information count based on a forged voter statement. We disagree. The record shows ample evidence from which a reasonable jury could find Boards forged a voter's signature to a voter statement and marked the voter's absentee ballot without authorization in violation of 42 U.S.C. § 1973i(c). Because we affirm this conviction and reverse the judgments of acquittal on her other convictions, we need not

address Board's assertion that her conspiracy conviction must rest on a substantive conviction.

Accordingly, we reverse the judgments of acquittal for Boards and Steele and remand to the district court with instructions to reinstate the jury's verdicts and enter judgments of conviction, and for further proceedings. We also affirm Board's other convictions.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1397EALR

United States of America, *
Appellant, *
vs. *
Regener Levon Boards, *
Appellee, *
* * * * *
United States of America, *
Appellant, *
vs. *
Brenda Sue Steele, *
Appellee. *

Appeals from the United States District Court for the Eastern District of Arkansas

No. 93-2538EA

United States of America, *
Appellee, *
vs. *
Regener Levon Boards, *
Appellant. *

Appellant's petition for rehearing by the panel is denied. The motion for stay of mandate has been considered by the court and is also denied.

January 4, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

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(2)

Supreme Court, U.S.
FILED
MAY 24 1994
OFFICE OF THE CLERK

No. 93-1569

In the Supreme Court of the United States

OCTOBER TERM, 1993

REGENER LEVON BOARDS AND BRENDA SUE STEELE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

QUESTIONS PRESENTED

1. Whether petitioners violated 42 U.S.C. 1973i(c), which makes it a crime to provide false information as to one's name for the purpose of establishing eligibility to register or vote, by completing absentee ballot applications in the names of other registered voters.

2. Whether sufficient evidence supported petitioner Boards' convictions on one of the substantive Section 1973i(c) counts and for conspiring to violate Section 1973i(c).

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In the Supreme Court of the United States

OCTOBER TERM, 1993

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REGENER LEVON BOARDS AND BRENDA SUE STEELE,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18-24) is reported at 10 F.3d 587. The opinion of the district court (Pet. App. 1-17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1993. The petition for rehearing was denied on January 4, 1994. Pet. App. 25-26. The petition for a writ of certiorari was filed on April 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Arkansas, petitioners Boards and Steele were found guilty of giving false information as to their names in order to establish eligibility to vote, in violation of 42 U.S.C. 1973i(c). In addition, Boards was found guilty of conspiring to commit that offense and to vote more than once, in violation of 18 U.S.C. 371. Following the verdicts, petitioners moved for judgments of acquittal. The district court acquitted Boards on three of the four false information counts, and acquitted Steele on all three false information counts. Pet. App. 1-17. Boards was sentenced to six months' imprisonment. The court of appeals reinstated the jury's verdicts as to both petitioners on the acquitted counts, and it affirmed Boards' convictions on the remaining two counts. *Id.* at 18-24.

1. The evidence showed that petitioners engaged in a fraudulent scheme to vote absentee ballots in the November 1990 general election in Phillips County, Arkansas, for seats in the United States Senate, the United States House of Representatives, and the state legislature. Pursuant to the scheme, petitioners completed absentee ballot applications in the names of other registered voters. Boards then forged the voters' signatures on some applications. Steele marked some applications with X's even though the voters were able to sign their own names. Without the authorization of the voters, petitioners directed in the applications that the county clerk send the absentee ballots to a post office box. That box was controlled by the candidate for whom petitioners were

working. Again without the knowledge or permission of the voters, the absentee ballots were then voted in favor of petitioners' candidate and returned to the county clerk's office, along with voter statements containing signatures forged by Boards and others. Pet. App. 19-20.

2. Following the guilty verdicts, the district court granted petitioners' motions for judgment of acquittal on several of the substantive counts under 42 U.S.C. 1973i(c). That statute prohibits "knowingly or willfully giv[ing] false information as to [one's] name * * * for the purpose of establishing [one's] eligibility to register or vote." In granting the acquittals, the court concluded that petitioners did not violate Section 1973i(c) because (1) the statute applies only to registering and voting, not to applying for an absentee ballot, Pet. App. 10-11; (2) petitioners did not provide false information as to the "names" of the registered voters—that is, they used the names of real registered voters instead of inventing false names, *id.* at 12-14; and (3) they did not complete the absentee ballot applications for the purpose of establishing their own eligibility to vote, but rather, to allow their candidate to cast fraudulent votes, *id.* at 12. In addition, the court found that the evidence was insufficient to establish that Steele filled out the absentee ballots with the intent of having them voted by anyone other than the lawfully registered voter. *Id.* at 6.

The district court upheld the guilty verdicts against Boards on the conspiracy count, Pet. App. 7, and one of the Section 1973i(c) counts, Pet. App. 15-16. The evidence on that substantive count showed that, after receiving an absentee ballot requested in the

name of Harry Shears, Boards actually voted the ballot in the election. In those circumstances, the district court concluded, the jury could find that Boards "willfully gave false information as to her name by representing that she was Mr. Shears in order to establish her (Board's) [*sic*] eligibility to vote Mr. Shears' absentee ballot." *Id.* at 16.

3. Both the government and Boards appealed. The court of appeals agreed with the government that the district court erred in granting the motions for judgment of acquittal. First, the court held that Section 1973 covers absentee ballot applications. The court reasoned that an absentee ballot application is a "vote" within the meaning of the statute because "an absentee voter must first apply for an absentee ballot as a 'prerequisite to voting.'" Pet. App. 21, quoting 42 U.S.C. 1973*l*(c)(1) (defining term "vote").

Next, the court of appeals rejected the district court's conclusion that a person using a real voter's name on a fraudulent ballot application does not violate Section 1973i(c). Pet. App. 21-22. The court explained that

> [t]here is no dispute that a person who "gives false information as to [the person's] name . . . for the purpose of establishing [the person's] eligibility to . . . vote" violates § 1973i(c). This is exactly what [petitioners] did. Because only registered voters are eligible to apply for and vote absentee ballots, the use of real registered voters' names was essential to the scheme to obtain and fraudulently vote absentee ballots for [petitioners'] candidate. Obviously, [petitioners] could not get the absentee ballots of other real voters by using their own names on the applications. Thus, [petitioners]

> "[gave] false information as to [their] name[s]" when they falsely used the names of real registered voters to apply for absentee ballots.

Ibid., quoting 42 U.S.C. 1973i(c).

The court of appeals also rejected the district court's conclusion that petitioners did not violate Section 1973i(c) because their purpose in seeking the absentee ballots was not to enable themselves to cast fraudulent votes. Pet. App. 22. The court held that petitioners could be held liable, as aiders and abettors, for facilitating their candidate's voting of the fraudulently obtained absentee ballots. *Ibid.*

The court of appeals disagreed with the district court's finding that the evidence failed to show that Steele intended to deprive the registered voters whose names were used of their ballots. Pet. App. 22-23. The court held that the jury properly could reject Steele's testimony that she was trying to help the voters obtain absentee ballots and "infer from her actions that she intended someone other than the registered voters obtain and vote the ballots." *Ibid.*

Turning to Boards' appeal, the court of appeals rejected her contention that the evidence was insufficient to support the Section 1973i(c) count that the district court had upheld. The court of appeals held that "[t]he record shows ample evidence from which a reasonable jury could find Boards forged a voter's signature to a voter statement and marked the voter's absentee ballot without authorization in violation of 42 U.S.C. § 1973i(c)." Pet. App. 23. Because the court affirmed that conviction and reversed the acquittals on the other substantive counts, it concluded that it "need not address Boards' assertion that her

conspiracy conviction must rest on a substantive conviction." *Id.* at 23-24.

ARGUMENT

1. Petitioners contend that the court of appeals erred in reinstating their convictions, because 42 U.S.C. 1973i(c) does not reach fraudulently obtaining and using absentee ballots. First, they argue that the court of appeals incorrectly construed Section 1973i(c) to prohibit not only the giving of false information by a registrant as to his or her own name, but also the "use" of a registrant's name by a third party. Pet. 10-12. In addition, petitioners argue that the statute does not reach the use of false statements to obtain an absentee ballot. Pet. 12-13. These contentions are without merit.

The court of appeals reinstated petitioners' convictions under Section 1973i(c), not because they gave false information about other persons' names, but because they provided false information about their *own* names on the absentee ballot applications. Petitioners could not have obtained the absentee ballots by using their own names on the applications, nor could they have obtained the ballots by using fictitious names, because those names would not have appeared on the registration rolls. Only by falsely using the names of real individuals were petitioners able to obtain the absentee ballots. Thus, the court of appeals correctly found that petitioners provided " 'false information as to [their] name[s]' when they falsely used the names of real registered voters to apply for absentee ballots." Pet. App. 21-22. The court's holding rested on the eminently reasonable proposition that a person provides false information

about that person's own name within the meaning of the statute when, in order to obtain an absentee ballot, that person uses someone else's name instead. Petitioners' use of false names, even though the names belonged to real individuals, was the "giv[ing] [of] false information as to [their] name[s]." 42 U.S.C. 1973i(c).

Petitioners claim that Section 1973 does not reach their conduct because they did not provide the false information to establish their *own* eligibility to vote as absentees. Pet. 12. But so long as petitioners' acts were part of a scheme to enable *some* person or persons to cast the fraudulent absentee ballots, petitioners can be held liable for violating the statute. As the court of appeals concluded, "[b]ecause [petitioners] were also charged as aiders and abettors under 18 U.S.C. § 2, * * * they may be held accountable for their candidate's or an unidentified principal's acts of voting the ill-gotten absentee ballots." Pet. App. 22. See *United States* v. *Horton*, 921 F.2d 540, 543 (4th Cir. 1990) (government need not prove identity of principal in order to hold a defendant accountable as aider and abettor), cert. denied, 111 S. Ct. 2860 (1991).

Nor is there any merit to petitioners' claim that Section 1973i(c) covers only the act of providing false information for the purpose of registering or casting a vote, and that it does not extend to providing false information in order to obtain an absentee ballot. Section 1973i(c) makes it a crime to provide false information for the purpose of establishing "eligibility to register or vote." The statute defines "vote" as "includ[ing] all action necessary to make a vote effective * * *, including, but not limited to,

registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly." 42 U.S.C. 1973*l*(c)(1). The statutory definition encompasses applying for an absentee ballot, because the application is a necessary means by which an absentee voter makes his vote effective. As the court of appeals observed, "an absentee voter must first apply for an absentee ballot as a 'prerequisite to voting.'" Pet. App. 21.

United States v. *Olinger*, 759 F.2d 1293 (7th Cir.), cert. denied, 474 U.S. 839 (1985), on which petitioners rely, has no relevance to this case. There, the defendant was convicted of conspiring to cast false ballots in a general election, in violation of 18 U.S.C. 371. On appeal, he claimed that he should have been charged under the conspiracy provision of Section 1973i(c). In rejecting that claim and holding that the defendant was properly charged under Section 371, the court concluded that Section 1973i(c) was "too specific" to cover the defendant's conduct because it applies only to the act of conspiring with one other person for the purpose of encouraging that person's false registration or illegal voting. 759 F.2d at 1299-1300. Nothing in *Olinger* addresses the question whether using the names of other registered voters on absentee ballot applications constitutes a substantive offense under Section 1973i(c).

2. In the "Questions Presented" portion of the petition, Boards raises the issue of the validity of the two convictions—one on the conspiracy count and the other on a substantive Section 1973i(c) count—that survived her motion for judgment of acquittal. Boards does not explain, however, why she believes those

convictions are defective. The substantive charge involved not the filing of false applications for absentee ballots, like the other substantive charges on which the district court granted the acquittals, but Boards' actual submission of an absentee ballot and voter statement in the name of another registered voter. Both courts below correctly held that such conduct clearly violates Section 1973i(c). Pet. App. 15-16, 23.

On appeal, Boards argued that the conspiracy conviction could not stand absent a valid conviction on at least one of the substantive counts. The court of appeals did not address that claim because of its correct determination that all the Section 1973i(c) convictions were valid. Pet. App. 23-24. In any event, to be guilty of conspiracy a defendant need not commit the underlying substantive offense; the agreement to commit the offense, which is the essence of conspiracy, is "distinct from the [offense] itself." *United States* v. *Felix*, 112 S. Ct. 1377, 1384 (1992), quoting *United States* v. *Bayer*, 331 U.S. 532, 542 (1947).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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